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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JULIUS CHRIS FISHERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Did the Court violate the mandate of F.R.Crim.P. 24(c) when it failed to discharge the two alternate jurors after the jury had retired for deliberation and thereafter substituted an alternate without obtaining an intelligent waiver of petitioner's rights.

Was the decision below contrary to the decision of this Court in the case of Kotteakos v. U.S., 328 U.S. 750 and did the Court disregard the principals enunciated therein respecting conspiracy prosecutions.

Was the search and subsequent seizure of the evidence from petitioner's two books in direct violation with the rule laid down in U.S. v. Wright, 667 F2d 793.

PARTIES INVOLVED

The following parties have an interest in the outcome of this case:

JULIUS CHRIS FISHERMAN, Petitioner

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To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States:

The petitioner, JULIUS CHRIS FISHERMAN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Citcuit entered in this proceeding on October 22, 1982.

A Petition for Rehearing was denied by the U. S. Court of Appeals for the Ninth Circuit on December 14, 1982.

OPINION BELOW

The Opinion of the Court of Appeals is attached hereto as Appendix "A".

JURISDICTION

The judgment of Court of Appeals in the instant matter was entered on 10-22-82. A Petition for Rehearing was thereafter filed by petitioner, and the same was denied by the order of the Court of Appeals filed 12-14-82. A copy of said order is appended hereto and designated as Appendix "B" to this petition. The juris-

diction of the Honorable Court is involved pursuant to the provision of Title 28, U.S. Code §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

U.S. Const. Art. 3, Sec. 2, Clause 3; see Appen. "C" U.S. Const., Amend. 6; see Appen. "C"

STATUTES

Title 21 U.S.C., §841(a)(2) & 846; see Appen. "C".

FEDERAL RULE OF CRIMINAL PROCEDURE

Rule 14 & 29; see Appen. "C".

STATEMENT OF THE CASE

Petitioner, JULIUS CHRIS FISHERMAN, hereinafter referred to as CHRIS or FISHERMAN was indicted in the U.S. District Court for the Eastern District of California as follows:

CHRIS was indicted in Count 1 with conspiracy to violate Title 21 U.S.C. §846.

CHRIS was found guilty of Count 1 of

the Indictment and sentenced to 15 years. CHRIS is currently serving his sentence at Lompoc Federal Prison.

STATEMENT OF THE FACTS

On 6-18-79 CHRIS was detained but not arrested at a bank in Los Angeles exchanging $2,000 in $20 bills for $100 bills. Contained in the $20 bills were two counterfeit $20 bills. Secret Service Agent Petievich then searched CHRIS' car trunk and found 6 - 7000 worth of $20 bills. NONE were counterfeit. Two address books were seized from the trunk and in one was the name of a known counterfeiter. Petievich retained the books until 2-18-80 when he forwarded the books to L.A.P.D. narcotics detail. Petievich said he retained the books and forwarded to L.A.P.D. because he felt CHRIS was a dope pusher. No other evidence of counterfeiting or narcotics activity was ever shown or known

to Agent Petievich. Rptr. Suppl. Tr. on App. (Motion to Suppress) pp. 1-31.

RUSSELL BRADLEY, in 1976, was contacted by co-defendant SMITH's wife, WANDA to get a pre-release for SMITH who was then in prison. (RT p. 115, l. 1; p. 116, ll. 8-20). Bradley did gain SMITH's release. (RT p. 117, l. 2). After release from prison, SMITH met Bradley in Sacramento in 1977; SMITH said he could obtain white heroin. (RT p. 118, ll. 11-22). Later SMITH gave Bradley a sample of heroin. (RT p. 119, ll. 14-15). At a second meeting SMITH gave Bradley a larger sample of heroin. (RT p. 120 l. 3). Bradley gave the sample of heroin to known addicts to test the potency and quality of the sample. (RT p. 120, ll. 23-24).

Bradley took deliveries of heroin at SMITH's house in 1977. (RT p. 124 l. 12).

Later, Bradley and SMITH cut heroin at

SMITH's house. (RT p. 129, ll. 4-12). Bradley sold heroin to co-conspirator Raugewitz on many occasions. (RT p. 132, ll. 22-23). Bradley sold dope to co-defendant Pope. (RT p. 135, ll. 10-15).

Bradley met co-conspirator W. Brantley in Aug., 1978. (RT p. 162, l. 15). Co-conspirator Eldridge and SMITH were both present at this meeting. (RT p. 163, ll. 23-25). Bradley sold hereoin to Brantley. (RT p. 164 l. 20). Brantley obtained heroin from co-conspirator L. Patton for Bradley. (RT p. 183-84, ll. 2-4).

Bradley received heroin from Patton in 1978. (RT P. 185, ll. 16-18). SMITH told Bradley to pick up the heroin from Patton. (RT p. 186, ll. 2-4). Bradley dealt regularly with Patton during 1978. (RT p. 187, ll. 23-25; p. 188, ll. 3-6). Raugewitz bought 200 ounces of heroin from Bradley. (RT p. 188, ll. 17-22).

Bradley was arrested 10-5-78, and became an informant for the DEA. (RT p. 190, 11. 10-17). On 11-30-78 L. Patton was arrested (RT p. 239, 11. 23-25), regarding this case. Eldridge was arrested on 3-28-79, (RT p. 260 11. 8-9), also regarding this case.

On 11-20-78, Bradley and DEA Agent Stoll made a narcotics transaction with Patton. (RT p. 267, 11. 14-16). Bradley arranged to pick up 32 ounces of heroin from Patton. (RT p. 317, 11. 16-23).

Bradley started to sell heroin in quantities in late 1975. (RT p. 379, 11. 21-23)

L. Patton told DEA Agent Cazares that on 11-30-78, he sold heroin to co-conspirator Pete Thompson. (RT p. 672, 11. 10-13). After Patton's arrest on 11-30-78, Agent Hardin searched Patton's house and found a large quantity of heroin. (RT p. 713, 11. 12-13; p. 715, 11. 23-25).

L. Patton first met SMITH in San Quentin in 1975. (RT p. 881). When Patton got out of prison in June, 1976, he met Wanda Smith in parking lot at San Quentin on July 4, and threw some stuff (heroin) he got from Wanda over the fence to SMITH. (RT p. 883).

After SMITH's release from prison a meeting at Patton's house in Fremont, California, on 8-2-77, Patton's wife, SMITH, CHRIS and co-conspirator Fred Stalkup were present. (RT p. 889). SMITH said "If I get a sale for any of the heroin, we will all be driving new cars." (RT p. 891) No testimony that CHRIS participated in any of the conversation or that he adopted any admissions by his conduct. (RT p. 891, 11. 7-8).

SMITH told Stalkup to go to Canada to pick up some white heroin. (RT p. 892, 11. 12-16).

Patton began selling white heroin to Thompson in 1977. (RT p. 894).

Early 1978 Patton went to Canada with Stalkup to pick up some China White. (RT p. 896, ll. 17-24). In Canada, Stalkup gave Patton a suitcase containing bags of white powder. (RT p. 898, ll. 14-16). After the pick up from Stalkup, Patton called SMITH and told him that Stalkup wanted to keep the heroin with him, and SMITH said okay. (RT p. 907, ll. 2-5). On 3-6-78, in Van Nuys, Patton gave $22,000 from payment on the heroin Stalkup picked up in Canada, to Val, wife of Peter. (co-conspirator Pirom Chongcharoen.) (RT p. 911, l. 20). This money had been received from SMITH. (RT p. 915, ll. 3-4).

SMITH told Patton that Peter, the man from Thailand, was supplying the China White. (RT p. 924).

Peter and Stalkup smuggled heroin from

Canada. (RT. p. 925 11. 14-21).

On 7-31-78, Patton had a conversation with SMITH about Zeke's Restaurant, owned by co-conspirator Wat. (RT p. 973, 11. 10-12). SMITH said he wanted Patton to get somebody to burn it down to keep Wat happy. (RT p. 973, 1. 15). Patton said he and his brother burned it down. (RT p. 973 11. 21-23). CHRIS moved to sever on ground that testimony was proving not one, but multiple conspiracies. Wat agreed to supply heroin to SMITH after Wat was released from prison. (RT p. 980). Zeke's was burned down 7-30-78. (RT p. 983 1. 22).

Patton met Joe (co-conspirator Krissanarguth) in Los Angeles. Joe was a courier for Peter. (RT p. 986, 11. 1-7). Patton picked up heroin from Joe in Los Angeles. (RT p. 986, 11. 8-9). Joe was going to deal on his own without Peter.

(RT p. 986, ll. 21-22). Patton purchased 2 lbs. heroin from Joe for $70,000. (RT p. 990, ll. 2-5). After purchase, Patton told SMITH everything was all right. (RT p. 990, ll. 12-13).

Patton in 1978 met Boon (co-conspirator Voravithaya). Boon needed money to get to Thailand to get connections to bring dope over. (RT p. 991, ll. 19-21). Patton gave Boon $1,000. (RT p. 991, l. 23). SMITH gave telephone number to Patton to call Boon. Patton picked up cans of heroin from Boon. (RT p. 992, ll. 5-9). Later Patton again purchased heroin from Boon. (RT p. 992, ll. 20-23).

Patton testified, "We was partners. Me and Bill." (RT p. 1012, ll. 9-12).

SMITH paid Patton's lawyers. (RT p. 1020).

Patton sold heroin received from Peter or Joe. (RT p. 1043).

DEA Agent David Ma, on 10-23-78, at L. A. Airport took into custody a Thai female named Phornpinol Hason with 3 cans of hairspray containing heroin in her possession. With her cooperation, a controlled delivery was established at the New Otani Hotel in L. A., (RT p. 1344). DEA Agent Fouse observed Joe in the lobby of the hotel. (RT p. 1351).

Co-conspirator Charles Pierce testified that Eldridge was dealing in drugs. (RT p. 1411). Pierce lived with co-conspirator Jack Underwood and dealt white heroin for him. Pierce sold heroin to co-conspirator Don Cameron, Riverman, Grandma, and Manuel Cervantes in Stockton, and to co-conspirator Louis Pater. (RT p. 1415). Pierce picked up heroin from Pater. (RT p. 1419, ll. 17-19). Pierce purchased hereoin from Eldridge. (RT p. 1451). Co-conspirator Barbara Edgmon gave Pierce 1 ounce of

heroin. (RT p. 1478, 11. 10-10). Eldridge sold brown heroin to Pierce in May, 1978. (RT p. 1487, 11. 13-18). Eldridge was a brown heroin peddler for some period of time. (RT p. 1487, 11. 19-20).

Eldridge gave heroin to co-conspirator J. B. Thacker in March, 1979. (RT p. 1589 1. 23). Eldridge was in heroin business with co-conspirator Jack Underwood in Sacramento. (RT p. 1593, 11. 16-25). W. Brantley also an associate of Eldridge in heroin business. (RT p. 1594 11. 1-2). Eldridge met Patton in 1978. (RT p. 1594).

Eldridge met co-conspirator Heifner 1978. (RT p. 1606, 11. 13-15). Stalkup gave Heifner white heroin. (RT p. 1607), 11. 1-2 & 8-10). Heifner said it was real good stuff and his customers liked it better than the brown heroin. (RT p. 1608 11. 8-25). Eldridge and Heifner received some heroin from Stalkup. (RT p.

1609).

Don Cameron became a customer of Eldridge's for white heroin. (RT p. 1613 11. 7-13).

Eldridge received white heroin from Smith.

In 1978 Heifner gave Brantley heroin. (RT p. 1616, 11. 2-12). Eldridge sold Pater white heroin that he had received from Brantley. (RT p. 1619, 11. 4-5). Eldridge sold Stalkup heroin. (RT p. 1624 11. 1-6). Brantley's partner was Eldridge. (RT p. 1627, 11. 15-16).

Don Cameron and Pater sold heroin purchased from Eldridge. Same was true of Grandma, Stalkup, Underwood, and R. Brantley. (RT pp. 1636, 1637).

After Patton arrested. Eldridge told SMITH, "Well, I guess the dope business is over now." SMITH replied, "No. There can still be some come in." (RT p. 1646); and

half of future sales of heroin would go to Eldridge. (RT p. 1652, l. 1).

Eldridge received lactose for cutting heroin from co-conspirator Bill Scribner. (RT p. 1661, l. 23).

Eldridge delivered heroin to Stalkup in December, 1978. (RT p. 1678 l. 14).

Brantley and Eldridge delivered heroin to Don Cameron. (RT p. 1687, ll. 13-14). Co-conspirator Chris Schilien (Grandma) paid Eldridge for heroin deliveries. (RT p. 1693, ll. 1725).

Eldridge in March, 1979, went to Canada at SMITH's direction to pick up heroin. (RT p. 1700).

Eldridge met oriental at hotel and gave him money. Oriental gave Eldridge a suitcase with heroin. (RT pp. 1708, 1709).

On 2-24-79, Eldridge sold white powder to Pierce from can obtained from SMITH.

Customs Agent Pizzo testified that on

9-18-79, he directed a Raymonde Steigleiter to a secondary inspection spot at the airport in Anchorage, Alaska. (RT p. 2271, ll. 2-12). She was coming from Japan. (RT p. 2271, l. 15). In Steigleiter's suitcase was some white powder in false compartments. (RT p. 2272, ll. 15-16). Following her detention, Miss Steigleiter and DEA Carter proceeded from Anchorage, Alaska, to San Francisco Airport. (RT p. 2289, ll. 2-3). Steigleiter on her person had a business card from a hotel in Bangkok, Thailand, that contained a telephone number. (RT p. 2291, ll. 14-15). A telephone call was subsequently placed to that telephone number. (RT p. 2292). Following that telephone call, a man arrived at the room of the Quality Inn Motel in which Steigleiter was staying, knocked on the door and was admitted by Steigleiter. (RT p. 2292, ll. 14-17). A short time later the

man left the room after which Steigleiter was found in possession of a grocery bag containing $45,000 in U.S. currency. (RT p. 2293, 11. 13-22).

M. Fiorentino, DEA, was at the Quality Inn Motel on 9-20-79, along with Steigleiter who was then cooperating with the government. He identified co-conspirator John Louie as the person who came to Steigleiter's room. (RT p. 2316, 11. 23-25). Fiorentino stopped John Louie outside the motel in an automobile and affected an arrest. (RT p. 2317, 11. 9-14). The suitcase that was originally in the possession of Steigleiter was found with John Louie in his vehicle at the time he was arrested. (RT p. 2317 11, 23-25). At time of seizure of the suitcase from Louie, it contained a portion of heroin that was originally in the suitcase at the time Steigleiter was arrested. (RT p. 2318, 11. 1-5).

As John Louie was carrying the suitcase, his brother co-conspirator Robert Louie and Wat were seen driving very close by. (RT p. 2318 11. 23-25). Wat and Robert Louie were arrested at the same time. (RT p. 2324 11. 20-21; p. 2328, 11. 17-18) In the trunk of the automobile in which Robert Louie and Wat were arrested was a shopping bag containing $37,000 in cash. (RT p. 2329, 11. 4-11).

James A. Stirwalt, a detective with L. A.P.D. on 1-16-80, while stationed at L.A. International Airport, observed co-conspirator David Remsing deplane a flight from Portland, Oregon, to L.A. (RT p. 2351 11. 21-23). Remsing met CHRIS for 5 minutes. Remsing returned to Oregon. (RT p. 2356).

Upon Remsing's arrival back at Portlant Airport, he was searched by security officers at the airport and the results of

that search were negative. (RT p. 2373, 11. 12-21).

Edgmon picked up money from co-conspirator James Cameron. (RT p. 2488, 11. 120 13).

Eldridge asked Edgmon to call co-defendant Truax to pick up some money Truax owed Eldridge. (RT p. 2491 11. 16-17). Truax gave Edgmon $3,000. (RT p. 2493 1. 13).

Edgmon sold both white and brown heroin for Eldridge. (RT p. 2502, 11. 3-8).

Boon worked with Wat during 1976. (RT p. 2627).

Boon met SMITH in early 1978. (RT p. 2633, 1. 24). Boon told SMITH the person in Thailand wanted SMITH to send him more money in order to get the heroin into this country. (RT p. 2636, 11. 10-12). SMITH told Boon he had given the money but had not received the dope yet.

(RT p. 2636, ll. 16-18).

SMITH asked Boon to go to Thailand and set up heroin deal for him.

Boon was to deliver heroin and collect money from SMITH. (RT p. 2639, ll. 11-13). Boon was then to fly back to Bangkok and give the money to co-conspirators Pirom and Viroj. (RT p. 2639). Boon received $3,000 for service from Viroj and Pirom. (RT p. 2643.

Following Patton's arrest on 11-30-78, Boon asked SMITH if he still wanted to do business with the people in Thailand. SMITH responded, "I'll try and get the business going again." (RT p. 2652 ll. 3-7). Boon told SMITH that thereafter he, Boon, would be the one handling the money and giving SMITH the drugs. (RT p. 2654, ll. 3-5).

Boon met CHRIS in L.A. (RT p. 2660). CHRIS told Boon any dope dealing going on

in L.A., he CHRIS, will take care of it. (RT p. 2661, ll. 10-12).

Viroj gave Boon heroin to give to Bill. (RT p. 2662, ll. 19-21).

SMITH gave boon money for heroin. (RT p. 2665).

In Vancouver, Canada, CHRIS gave boon $40,000 in cash. (RT p. 2673, l. 6).

Viroj told Boon to tell Wat a lot of dope would be coming into L.A. (RT p. 2678). Viroj wanted large bills. (RT p. 2678, ll. 23-24). Viroj told Boon who told Wat that there would be approximately 7 lbs. of heroin coming into L. A. and Viroj wanted Wat to get $200,000 together in large bills. (RT p. 2679, ll. 5-8). Courier arrived with dope at Boon's hotel. (RT p. 2681). Wat arrived with $200,000 in $100 bills. (RT p. 2681, l. 22). Wat said the person who picked up the dope said it was off-white. (RT p. 2683). Wat and Boon

went to CHRIS' house. (RT p. 2683. CHRIS opened suitcase dope inside was off-white. (RT p. 2684).

Boon was selling dope in 1980 to Thai in L. A. by name of Chow. This was apart from his dealings with SMITH. (RT p. 2708, ll. 18-21). Boon was also dealing with Thai name of Kom. (RT p. 2710, ll. 2-3). Boon delivered a 1 1/2 lbs. of heroin to Chow. (RT p. 2710, ll. 21-24). Boon received $45,000 from this sale. (RT p. 2711, l. 7). A person by the name of Ga was also involved with Boon in his dope dealing activities, separate and apart from his dealings with SMITH. (RT p. 2714 ll. 18-22). The people in Thailand sent the heroin to Boon in L. A. for delivery to Chow. (RT p. 2715, ll. 23-24). These suppliers in Thailand were not Pirom and Viroj. Ga told Boon where to pick up the heroin. (RT p. 2717, ll. 1-2). Another

transaction with Ga and Boon brought Boon $75,000, cash. (RT p. 2718, 11. 13-14). Boon took the $75,000 back to Bangkok and kept $15,000 for himself. (RT p. 2719, 11. 10-11). Boon last saw Wat in 1979, Thailand. (RT p. 2721). Boon first got into the heroin business around 1977. (RT p. 2726). In Kom's dope operation, Boon only took orders. (RT p. 2737, 11. 13-15).

Boon and friend Tieereno were involved in a Thai stick operation. IRT p. 2777, 11. 17-20). Boon and Tierreno smuggled Thai sticks into the U. S. from Thailand. (RT p. 2780, 11. 13-25; p. 2781 11. 1-3).

At the conclusion of the government's case, appellants filed a motion for a judgment of acquittal pursuant to R.F. Crim. P. 29 and various other motions to strike and sever as follows: CHRIS moved to strike and sever with regard to testi-

mony as to the burning of Zeke's Restaurant in that it is a separate and distinct conspiracy. (RT p. 3083).

CHRIS moved to strike the testimony of Boon in reference to CHRIS' taking care of any dope deals in L.A. as being outside the scope of any conspiratorial issues in that it constitutes a separate and new conspiracy from that charged in the indictment. (RT p. 3088). CHRIS moved to strike Ex. 223 which is the notebook that was recovered from him on the occasion of his being stopped on 6-18-79. CHRIS urged that no evidence connected him to any illegal activity in the Eastern District of California. (RT p. 3084).

CHRIS' motion to strike testimony related to conspiracy as being irrelevant were denied. (RT p. 3224). CHRIS' motion to dismiss and for judgment of acquittal based upon a fatal variance between the

indicted charges and the government's proof in that multiple conspiracies were proved where one was alleged was denied. (RT p. 3224). CHRIS' motion for severance and motion for change of venue were denied. (RT p. 3237). CHRIS' renewed Rule 29 motion was denied. (RT p. 4148). All other motions of CHRIS were denied. (RT p. 4151).

On 5-14-81, the jury retired for deliberations. (RT p. 4299, 11. 16-17). Rather than discharging the alternates, the Court directed them to remain in the jury lounge. (RT p. 4299).

On Monday, 5-18-81, juror Nichols advised the Court that her mother was scheduled for exploratory cancer surgery and was in danger. Juror Nichols requested to be excused. (RT p. 4334, 11. 12-14). Without an exploration of the alternatives available, the Court proposed that counsel

stipulate to the substitution of an alternative juror. The stipulation was given. (RT pp. 4334-37). (see App. "D" attached).

ARGUMENT

I

WITHOUT OBTAINING AN INTELLIGENT WAIVER OF PETITIONER'S RIGHTS UNDER R.F. CRIM. P. 24 (c), THE COURT IMPROPERLY SUBSTITUTED ALTERNATE JUROR SEALS DURING DELIBERATIONS.

Under R.F. Crim.P. 24(c), an alternate juror who does not replace a regular juror during trial "shall be discharged after the jury retires to consider its verdict." This requirement is mandatory, and failure to abide by it is reversible error. U.S. v. Lamb, 529 F2d 1153, 1155-56 (9th Cir. 1975); U.S. v. Hayutin, 398 F2d 944, 950 (2d Cir.); cert denied, 393 U.S. 961 (1968) The dictates of the rule may be waived, Leser v. U.S., 358 F2d 313, 317 (9th Cir.); cert dismissed, 385 U.S. 802 (1966); but the waiver must be voluntarily, knowingly and intelligently made. Patton v. U.S.,

281 U.S. 276, 312 (1930); U.S. v. Baccari, 489 F2d 274, 275 (10th Cir. 1973); cert. denied, 417 U.S. 914 (1974); Leser v. U.S., supra. Moreover, the trial court's duty to obtain an effective waiver "is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial. . . ." Patton v. U.S., supra, at pp. 3120-313. Because this standard was not observed, the Court committed reversible error.

After the jury was instructed, the trial court did not discharge the two remaining alternates, as required by F.R.Crim.P. 24 (c), but rather asked them to remain, separated from the trial jurors.

On the third day of deliberations, Juror Nichols asked to be excused. Defendant Bickford objected to the Court's request that counsel stipulate to the dis-

charge of Juror Nichols and the substitution of alternate Juror Seals. When Bickford hesitated, the Court warned that he would give counsel only a short time to decide and intimated that if counsel were to insist, the jury would very likely truncate its deliberations. Counsel assented. At no time did the Court explore with counsel and the defendants the other possible means of resolving the dilemma.

In sharp contrast to the instant situation are the cases in which an effective waiver was found. In Leser v. U.S., supra, it appeared before jury deliberations had begun that one juror might have to be excused, the court discussed the problem with counsel and obtained a stipulation to retain the alternates during deliberations. Id. at 317. When the juror did become ill, counsel merely agreed to put the prior stipulation into effect. Id. The district

court did not urge that the parties enter into the stipulation. They had every opportunity to refuse. Id. at 317.

The instant case is different. Without consulting counsel or obtaining a waiver of F.R.Crim.P. 24(c) before deliberations began, the court instructed the alternate jurors to remain while the jury deliberated. (RT p. 4299, 11. 1823). Then, when the problem with Juror Nichols arose, there was no prior stipulation reached without pressure, as in Leser, but rather a hastily-made decision formed without exploration of the alternatives. This agreement is not a valid waiver of F.R.Crim.P. 24(c). See U.S. v. Evans, 635 F2d 1124, 1125-26 (9th Cir. 1980), cert. denied, ___ U.S.____, 101 S.Ct. 3090 (1981).

In U. S. v. Evans, 635 F2d 1124, 1125-26 (4th Cir. 1980) cert. denied,___ U.S.____, 101 S.Ct. 3090 (1981), the trial

court excused a juror during deliberations and advised the defendant that he could stipulate to the substitution of an alternate, insist on a mis-trial or elect to proceed with the remaining 11 jurors. The defendant unequivocally asked that the alternate be substituted. Similarly in U.S. v. Davis, 608 F2d 698 (6th Cir. 1979), the Court of Appeals found that the defendant effectively waived his rights under F.R.Crim.P. 24(c) when he chose to proceed with an alternate juror substituted during deliberations following the trial court's explanation of three alternative procedures: deliberations could continue with the 11 remaining jurors, the alternate juror could be discharged or the deliberations could be delayed until the absent juror returned.

The trial court in this case in essence urged that the stipulation be accepted

without exploring the other possible solutions to the problem. Acting "as a mere matter of rote," the trial court did not obtain the knowing and voluntary waiver of the provisions of F.R.Crim.P. 24(c), as defined by the case law. Because of this failure, the mandatory provisions of F.R. Crim.P. 24(c) were violated. As a consequence, CHRIS had a trial decided by 13 jurors, or 2 separate juries of 12 each. Reversal is warranted. U.S. v. Lamb, supra.

ARGUMENT

II

THERE IS A FATAL VARIANCE BETWEEN THE CONSPIRACY CHARGED IN THE INDICTMENT AND THE MULTIPLE CONSPIRACIES PROVED AT TRIAL, WHICH SUBSTANTIALLY PREJUDICED THE RIGHT OF PETITIONER TO A FAIR TRIAL.

Count 1 of the Indictment charged 22 defendants and 24 unindicted co-conspirators with conspiring to possess with the intent to distribute heroin and to distribute heroin in violation of Title 21

U.S.C. §841(a)(1). In furtherance of the agreement, the Indictment alleged 254 overt acts by various persons. The conspiracy was alleged to have commenced and occurred at a time unknown but no later than 7-4-76, and continuing to on or about 7-4-80, in this State and Eastern District of California and elsewhere.

If an Indictment charges jointly tried defendants with participation in a single conspiracy, but the evidence reveals multiple discrete conspiracies, such a variance of proof may be so prejudicial as to require reversal of the conviction. Reversal is called for if the variance between the Indictment and the proof affects the substantial rights of the parties. Kotteakos v. U.S., 328 U.S. 750 (1947); Berger v. U.S., 295 U.S. 78 (1935); U.S. v. Friedman, 593 F2d 109, 116 (9th Cir. 1979).

Thus, the review of this case involves

two separate inquires: was there a variance, and if so, was it prejudicial. U.S. v. Durades, 607 F2d 818 (9th Cir. 1979).

A. Standard of Review

In reviewing the arguments, we must read the evidence in the light most favorable to the government, and must reverse the convictions if it is found that any reasonable jury thus reading the evidence must necessarily have entertained a reasonable doubt as to the defendant's guilt. Glasser v. U.S., 315 U.S. 60, 80 (1942); U.S. v. Ocanas, 628 F2d 353, 360 (5th Cir. 1980).

B. Appellants Timely Objected to the Proof

As set forth in the Statement of Facts, petitioner objected to the variance throughout the prosecution's case in chief by arguing that the testimony showed a different conspiracy and was not relevant.

Also, at the conclusion of the prosecution's case. Petitioner moved under Rule 29 F.R.Crim.P. for a judgment of acquittal on the grounds of variance. In his written motions, attorney for petitioner cited 18 separate conspiracies and in his oral motion, the attorney for appellant SMITH cited 6 different conspiracies. (RT pp. 3172-79). The Rule 29 motions were renewed at the conclusion of the presentation of evidence and were denied.

C. The Variance

The Indictment alleges one single overall conspiracy which contained other smaller conspiracies in support of the single conspiracy. The evidence shows 4 separate and distinct conspiracies, each independent of the others, each involving difference persons and occurring in different federal districts.

"It is now well settled that a material variance between the indictment and the government's evidence is created by the government's proof of multiple conspiracies under an indictment alleging a single conspiracy. The common element in these conspiracies consists solely of one man who had directed each group." U.S. v. Sutherland, 656 F2d 1181 (5th Cir. 1981).

In this case the evidence of multiple conspiracies was as follows:

1. The First Conspiracy

On 7-4-76, Patton met Wanda Smith at San Quentin Prison and the next night threw heroin over the fence for SMITH.

2. The Second Conspiracy.

A year after the first conspiracy, in August, 1977, SMITH was released from prison and some time in 1977 or 1978, Bradley Patton, and SMITH commenced importing and distributing heroin in Sacramento. Later in 1978, Eldridge became a major participant until his arrest in March, 1979. The conspiracy ended with the arrests of Bradley, Patton and Eldridge.

3. The Third Conspiracy

This conspiracy involved the "Shuen Louie" group and Wat and SMITH. It operated in San Francisco and ended with the arrest of Louie in September, 1979.

4. The Fourth Conspiracy

This conspiracy came into being in 1979. SMITH, CHRIS, boon, and Wat formed the fourth conspiracy, based in Los Angeles. They received heroin from Vancouver, Canada and Thailand. It ended some time in 1980.

5. Argument

"This 'multiple conspiracy' doctrine is commonly illustrated by the Supreme Court's decision in Kotteakos v. U.S., 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)... The common element in these conspiracies consisted soley of one man who had directed each group; aside from this single defendant, there was no connection among the various agreements. Despite their similar objectives and despite their common leadership, none of the Kotteakos conspiracies aided or benefited from the others, and no member of the various conspiracies (other than the leader) was aware of the

others." U.S. v. Sutherland, 656 F2d 1181, 1189 (5th Cir. 1981).

The evidence at the trial of this case falls within the "multiple conspiracy doctrine." The central person common to the four conspiracies was SMITH and the witnesses indicated that he directed or controlled the operation. There were at various times different suppliers of the heroin and different distributors; and at times, they interchanged their respective roles leaving, however, the direction and control to SMITH. Significant is the fact that in this case, the conspiracies were not "interdependent." The survival of one did not depend upon the success or failure of the other and none aided or benefited from the others. The evidence did not show that the Wat and Louie brothers group knew of the existence of the Bradley-Patton-Eldridge group or that

the later Wat-Boon-Fisherman group knew of the Bradley-Eldridge-Patton group. However, even if some knowledge were shown, there is no evidence that these groups were "interdependent" or existed by some over-all agreement of the participants.

As stated in Kotteakos, supra, the pattern established in this case by the government consisted of "separate spokes meeting in a common center" but "without the rim of the wheel to enclose the spokes." Id. at 755. Absent some connection (the rim) among the various conspirators (the spokes), the government's proof established multiple conspiracies. U.S. v. Sutherland, supra. As stated in U.S. v. Kenny, 645 F2d 1323, 1334-35 (9th Cir. 1981), establishing a single conspiracy of the wheel type genrally requires that the "spokes" are bound by a "rim," i.e., the circumstances must lead to an infer-

ence that some form of over-all agreement exists. In this case, there is no evidence that the Louie group agreed to do anything with the Bradley-Patton-Eldridge group or that the Wat-Boon-CHRIS group agreed to assist either of the aforementioned groups. A very significant factor is the time of existence and the location of the groups. The first conspiracy, the Patton-Wanda Smith-SMITH group, was in existence in July, 1976 in the Northern District of California and was never tied to the later conduct of the parties. The second conspiracy, the Patton-Bradley-Eldridge group, existed in the latter part of 1977 through March, 1978, when Eldridge was arrested. It operated in the Eastern District of California and up into Canada, but it is not shown to have operated in the Northern or Central Districts of Calif.

Generally speaking, a conspiracy ends

with the arrest of the co-conspirators. U.S. v. Killian, 524 F2d 1268 (5th Cir.); cert denied, 425 U.S. 935 (1975). In the second conspiracy, Bradley was arrested and working for the Federal Drug Enforcement Adminsitration from September, 1978. Patton was arrested and in custody from 11-30-78, and Eldridge was arrested and finally in custody from 3-28-79. Thus, this conspiracy had come to an end in the Eastern District of California by March, 1979.

The third conspiracy, the Louie group, waS terminated by the arrest of the Louies in San Francisco, California, on September, 1979. This conspiracy is not shown to have been interdependent with any of the other groups nor is the scope of its operations revealed. The time of commencement is not shown either. The courier, Raymonde Steigleiter, arrived in the Northern

District of California, and the record shows activity in this conspiracy only in this district.

The fourth conspiracy, the Wat-Boon-CHRIS group, came into existence after March, 1979. The activities of this group were in the Central District of California, the State of Washington and Canada. The activities occurred after termination of the other groups and there was no activity by them in the Eastern District of Calif.

The facts show that SMITH left the Sacramento, California, area upon the death of his wife, Wanda Smith, on 2-6-79, and was rarely, if ever, in the jurisdiction of the Eastern District of California. The next evidence relevant to the fourth group was that CHRIS in April, 1979, went from Los Angeles, to Canada and back, and in June or July received a shipment of heroin at his home in Los Angeles. There

is no evidence that he or others entered the Eastern District of California in connection with this conspiracy. Finally, the evidence shows that SMITH was residing with Maureen McCarthy in Santa Monica, California, about this time. All of these acts were in the Central District of Calif.

Thus, the aforementioned facts do not show the necessary concert of action to establish a single over-all conspiracy. The parties were not working together, in pursuit of a single design for the accomplishment of a single purpose as in U.S. v. Camacho, 528 F2d 464, 469 (9th Cir.); cert. denied, 425 U.S. 995 (1976); Blumenthal v. U.S. 332 U.S. 539 (1947).

To establish the "rim," the evidence must show that each defendant was involved and that there was a meeting of the minds. Mere association and activity with the conspiracy is insufficient. U.S. v.

Kenny, supra. While each of the conspiracies involved the design to possess and distribute heroin, that does not make it a single over-all conspiracy. The significant factor necessary and missing in this case is the "meeting of the minds"--an over-all common goal. The evidence establishes multiple independent conspiracies at variance with the single conspiracy charged in Count I of the Indictment. To hold that these conspiracies were one single conspiracy would be an unwarranted broadening of traditional conspiracy concepts. Even the toll calls failed to prove any conspiracy on the part of petitioner.

Petitioner at the trial offered no evidence that these calls were any more than station-to-station calls. The toll calls do not reveal who made the call, who received the call or what was said. The bare toll call records were merely put into

evidence.

In U. S. v. Fielding, 645 F2d 719 (9th cir. 1981). the court discussed the admissibility of hearsay statements of co-conspirators under Fed. Rule of Evid. 801(d)(2)(e) and affirmed that a foundation be laid to show that (1) the declaration was in furtherance of the conspiracy, (2) it was made during the pendence of the conspiracy, and (3) there is independent proof of the existence of the conspiracy and of the defendant's connection with the conspiracy. In the Opinion, the court cited the language of U.S. v. Eubanks, 591 F2d 513 (9th Cir. 1979). "Sufficient evidence had to exist to support an inference that the statements were made in furtherance of the conspiracy, while the conspiracy was in existence."

CHRIS contends that the same standards required for admissibility, be used in

determining if evidence is corroborative. That is, the corroborative evidence must be shown to be connected in some way to the existence of the conspiracy or that it was something occurring in connection with the conspiracy or in furtherance thereof. A failure to show the nexus between the act and the conspiracy makes all acts, however innocent, corroborative. CHRIS contends that this standard is too broad.

In the instant case, without a showing that the toll calls were somehow connected to a furtherance of the conspiracy there is no "corroborative evidence" that CHRIS was involved in the conspiracy for which he was tried in the Federal Court, Eastern District of California.

D. The Variance Affected the Substantial Rights of Petitioner

If the government indicts several defendants under a single conspiracy count

and yet proves multiple conspiracies at trial, a material variance results and the defendants are each entitled to a new trial if they can show that their substantial rights were affected by the variance. Kotteakos v. U.S., supra; U.S. v. Elliott, 571 F2d 880, 900 (5th Cir.); cert. denied, 439 U.S. 953 (1978).

The variance in this case was substantial in that it caused CHRIS to be brought to trial with persons involved in other conspiracies wherein the conduct of the others was highly inflammatory and prejudicial.

CHRIS was involved only in the fourth Wat-Boon conspiracy. While he was present at the Fremont, California, meeting at Patton's house, which is in the Northern District of California, it is not shown that he participated in the conversation or adopted the remarks of SMITH by his

conduct.

The evidence affirmatively shows CHRIS was not a participant in the second conspiracy but merely in the presence of others. Mere association between persons cannot suffice as proof of a conspiracy. While the government need not prove the existence of a formal agreement, it must do more than pile inference upon inference upon which to base a conspiracy charge. U. S. v. Sheikh, 654 F2d 1057, 1063 (5th Cir. 1981). Nor can suspicion, however strong, serve as proof of a conspiracy. Causey v. U.S., 352 F2d 203, 207 (5th Cir. 1965). There is no evidence other than "mere association" by CHRIS in this second conspiracy and the affirmative proof is that he was not involved as shown by the statement of Eldridge and the conduct of SMITH in not wanting the transfer of heroin or money to take place in front of CHRIS. The

logical inference is that SMITH insisted that he and Eldridge go into the restroom because he did not want CHRIS involved.

If the variance prejudices substantial rights such as by surprise or by transference of guilt by substantial evidence of crimes unrelated to the defendant, the defendant must be acquitted. U.S. v. Read, 658 F2d 1225, 1230 (1981).

The evidence proved to support the second conspiracy was highly inflammatory and prejudicial. Seldom will any court see three characters in a row offered as government witnesses so totally without redeeming social value. All had felony convictions. Bradley admitted he would li e and even perjurer himself if it were to his benefit. Patton was a "baby raper" and had a long history of violent felonies. Eldridge was a pimp and woman beater.

They testified to many "mini-conspiracies" including supplying handguns, arson of Zeke's bar for insurance proceeds, and two contracts to murder co-conspirators.

This testimony could only inflame the jury and lead to a "transference" of guilt from themselves and people in the second conspiracy to CHRIS who was involved only in the fourth conspiracy.

A strong argument can be made that a variance between a single conspiracy Indictment and evidence of multiple conspiracies should be treated not as a variance problem at all but rather as a misjoinder question. The problem presented by such a case is the transference of guilt among defendants who should not have been joined together in a single trial. U.S. v. Sutherland, supra, n.6.

CHRIS filed a severance motion prior to trial and throughout the trial moved

for severance based upon the prejudicial nature of the evidence. At the conclusion of the prosecution's case, he moved for severance under Rule 14, R.F. Crim.P., citing prejudice from the likelihood of a transference of guilt. These motions should have been granted for it was not harmless error. It was error that affected a substantial right--the right not to be tried en masse. Kotteakos v. U.S., supra at p. 775.

The "harmless error" rule should not be applied in this matter, for as stated in Kotteakos, "The question is not whether the jury's verdict was right, regardless of the error, but what effect the error had or reasonably may have had upon the jury's decision." Id.

Without the transference of guilt from the other conspiracies, the case against CHRIS would have been dramatically weaker

because it would have been based solely on Boon's testimony.

It cannot be said with fair assurance that the error did not substantially sway the jury and a substantial right was affected.

In order for the variance to be fatal, it must affect the substantial rights of the accused either by insufficiently informing him of the charges against him such that he is taken by surpirse and prevented from presenting a proper defense or by affording him insufficient protection against prosecution for the same offense. U.S. v. Sheikh, supra.

Looking to the Indictment, nothing in it gave notice to CHRIS that he should be prepared to meet a charge of conspiracy with Boon in the Central District of California, yet Boon was the only witness showing more than mere association by

CHRIS in the fourth conspiracy.

More importantly, nothing in the indictment put him on notice that matters which took place in the Central District of California would be proved at this trial. If Boon had not testified CHRIS surely would have been acquitted at the Rule 29 hearing or when the case went to the jury. This proceeding would not be a bar because of jeopardy or multiple prosecutions to a later prosecution in the Central District based primarily upon Boon's testimony, yet the government here claims it was one single conspiracy.

The misjoinder of conspiracies prejudiced petitioner in another fashion, for it forced him to be tried in the Eastern District for the Central District conspiracy. Absent defendant's request, a change of venue may not be ordered. Absent a waiver, an abridgment of the right to be

tried by a jury of the state and district wherein the crime shall have been committed denies defendant fundamental fair process guaranteed by the constitution and is inherently a harmful error. U.S. v. Stratton, 649 F2d 1066 (5th Cir. 1981); U.S. v. Durades, supra., see U.S. Constitution, Art. 3, Sec. 2, Clause 3; U.S. Constitution Amend. 6

CHRIS did not give any waiver or agreement to be tried in the Eastern District of California, yet he was tried in that District for offenses committed in the Central District of California.

While venue can be proved by a preponderance of the evidence, U.S. v. Durades, supra, there is nothing in the record to imply that the fourth conspiracy had any connection with the Eastern District.

This case is similar to the Durades case where one conspiracy was charged and

yet two proved and the one involving the defendant did not occur in the district where Durades was tried.

The failure to try CHRIS in the Central District is constitutional error and substantially infringed his right to trial in the district where the crime was allegedly committed.

It is noted that after Patton's arrest Boon sought out SMITH and when asked if he wanted to do business, SMITH said he'll get the business going again. (RT p.2652)

The rational inference then is that the business, i.e., the conspiracy, ended with the arrest of Patton. It then began and ended with the arrest of Eldridge. What we have is in fact not a "hub" conspiracy and not a "chain" conspiracy, but a series of conspiracies, each occurring at a different time, involving different persons and different court districts. While the

theme is the same, i.e., distributing heroin, there is no over-all common scheme, design, or interdependence. Confronted with evidence relating to the many discrete conspiracies, the jury undoubtedly found it difficult to assess separately each charge against SMITH. The psychological impact of the comingled evidence cannot be gainsaid. The real possibility exists that this impact lowered the government's burden of proof below the constitutional requirement as to SMITH. This is substantial prejudice.

Additionally, the misjoinder of the various conspiracies created numerous violations of the right of confrontation as enunciated in Bruton v. U.S., 391 U.S. 123 (1968) for petitioner. The record is clear that counsel promptly objected to hearsay evidence throughout the trial on confrontation grounds. This cumulative

error with a denial of severance was a substantial error.

ARGUMENT

III

THE SEIZURE OF PETITIONER FISHERMAN'S TWO BOOKS WAS UNLAWFUL.

A. The "Mere Evidence" Standard

The seizure of the two books cannot be properly justified. The language found in Warden v. Hayden, 387 U.S. 294 (1967), itself precludes the admissibility of the two books. As the Supreme Court properly observed, Hayden requires the government to show (1) that there is a nexus between items seized and criminal behavior, and (2) that probable cause must be examined in terms of cause to believe that evidence sought will aid in a particular apprehension or conviction for a particular offense. This test has not been met here particularly upon consideration of the principle that

the existence of consent to search should not be lightly inferred. U.S. v. Patacchia, 602 Fed. 218 (9th Cir. 1979). The burden rests on the government to show that proper consent was given and the perimeters of this consent have not been sidestepped by the officers. U.S. v. Rubalcava-Montoya 597 F2d 140 (9th Cir. 1978); U. S. v. Dichiarinte, 445 F2d 126 (7th Cir. 1971).

This case is not unlike Dichiarinte, supra. There the defendant consented to a search of his premises for narcotics. The government took advantage of this consent and opted to read through defendant's personal papers which provided the basis for income tax evasion charges being brought against him. The court rejected the government's contention that defendant's statement to agents to "come over to the house and look" gave the government a license to conduct a general exploratory

search which turned up the incriminating evidence. The instant case is right on point with U.S. v. Wright, 667 F2d 793. In Wright special agent Kelly of the Federal Bureau of Alcohol, Tabacco & Firearms executed a federal search warrant that authorized the seizure of a California driver's license issued to a "Deborah Lu Luckie" who was believed to be sharing the searched residence with defendant Wright. The license was sought as evidence of alleged federal firearm violations by Ms. Luckie.

The day before executing the warrant Kelly requested the assistance of California Bureau of Narcotics Enforcement investigator Frantzman. Kelly invited Frantzman because Wright had a reputation as a major narcotics dealer. Kelly conducted the search and found a small black ledger. Apparently he looked through it

without finding the license which was the subject of the search. Because of the possibility that it might involve drug trafficing, he brought the book to Franzman, who inspected the contents and concluded that it contained narcotic notation. The ledger was then seized.

The court went on to hold that "The government's "plain view" argument must fail. We recognize that Kelly, upon finding the ledger, was justified in inspecting it to determine whether the license that was the subject of the warrant was hidden there. To check the ledger for the license, however, did not require the perusal of the ledger's written contents. Moreover, nothing about the ledger, its whereabouts or contents immediately indicated to Kelly that the ledger contained evidence of a crime...."

"Consequently, Kelly exceeded his

authority to search for the license when he took the ledger to Frantzman so that he could inspect its contents. Similarily, Frantzman had no right to read the ledger's entries. The incriminating nature of the ledger was not "immediately apparent" to Frantzman but was revealed only after he carefully examined its contents".

The court went on to state that "If it were permissible to inspect the contents of the ledger, officers acting under a search warrant for any specific item would be empowered to inspect minutely diaries, letters, films and all matter of private materials unrelated to the authorized scope of the search to permit this type of conduct under the cloak of the plain view exception would be tantamount to enlarging the scope of any search to that of the "general warrant" abhorred by the colonists. The Constitution protects against such in-

trusions."

In the instant case, the two books--the legality of the seizure of which is contested--were quite small in size (3" x 2" and 1" x 2") and were hardly a place to accommodate counterfeit currency. Indeed, when the defendant did give his consent, he did not intend to divulge his autobiography to the government. All he intended was to show he was not carrying any counterfeit bills in the trunk of his car which the search showed that he was not. Agent Petievich by closely scrutinizing the two books, chose to conduct a blind search hoping to find any evidence of any crime contrary to legal standard. Agent Petievich subsequently gave copies of the two books to the L.A.P.D., 8 MONTHS LATER, who further scrutinized the books. At no time was any counterfeit money found in either of the books. Just as in Wright,

Agent Petievich violated defendant's Constitutional right by looking at the names and numbers in the two books and subsequently handing copies of the books to the State Department of Drug Enforcement and the L.A.P.D. There were no facts indicating that the two books contained evidence of a crime. (see Append. "D", pp. 22, 23, 26, 29, 31).

The instant case differs from U.S. v. Sheehan, 583 F2d 30 (1st Cir. 1978) which tackled the issue of the seizure of names found in defendant's wallet pursuant to his arrest. There, the defendant was a suspect in a bank robbery robbed by several people. Since the arrest was legal, the Court rationalized, it gave a greater latitude for a warrantless search and since it is "respectable police work to assume that checking out known associates of a suspect in a bank robbery committed

by several people might yield helpful information." (emphasis added). Id. at p. 32, the evidence was properly admitted.

In this case, petitioner was not under arrest and there was not a scintilla of evidence to indicate that a conspiracy was afoot. Therefore, while the search may have been proper, the seizure of the evidence from the books cannot be justified since no showing was made that such seizure was designed to aid in a particular apprehension or conviction for a particular offense.

CONCLUSION

It is, therefore, respectfully requested, on the basis of the arguments presented and the authorities cited hereinabove, that the within Petition for Writ of Certioriari be granted and the matter be set for hearing on the Honorable Court's docket.

Respectfully submitted,

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